82-1649

No. ____

Office-Supreme Court, U.S.
FILED
APR 7 1983
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HECTOR ANDRES MARROQUIN MANRIQUEZ,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Did the Refugee Act of 1980 reduce the burden of proof a noncitizen must meet (from "clear probability" to "well-founded fear" of persecution) in order to secure relief from deportation on the ground that he would be subject to political persecution in the country of deportation?

2. Was the court below required to reverse an order of deportation where the decision of the Board of Immigration Appeals was not supported by substantial evidence?

3. Was an applicant for withholding of deportation denied due process of law where the Immigration Judge refused to issue a subpoena *duces tecum* for United States government documents which were essential to show that his fear of persecution was well-founded?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Hector Andres Marroquin Manriquez petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, denying him asylum and withholding of deportation.

OPINIONS BELOW

The opinion of the court of appeals (App. A, A-1 to A-16)[1] is unreported. The opinion of the Board of Immigration Appeals (App. B, A-17 to A-48) is also unreported. In addition, the decision of the Immigration Judge (App. C, A-49 to A-79) is unreported. Finally, the court of appeals' denial of the petition

1 References to "A" are to pages in the appendix to this petition, *post.*

for rehearing and suggestion for rehearing *en banc* (App. D, A-81 to A-82) is unreported.

JURISDICTION

The judgment of the court of appeals is dated January 27, 1983 (App. A). Petitioner's motion for rehearing and suggestion for rehearing *en banc* was denied on February 28, 1983 (App. D) and the mandate was issued on March 8, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The relevant statutes and rules involved are 8 U.S.C. § 1101(a)(42); § 208 of the Immigration and Nationality Act (hereinafter the "INA"), 8 U.S.C. § 1158; § 242(b)(3) of the INA, 8 U.S.C. § 1252(b)(3); § 243(h) of the INA, 8 U.S.C. § 1253(h); 8 C.F.R. § 287.4; United Nations Convention and Protocol Relating to the Status of Refugees in 1968 Articles 1 and 33, 19 U.S.T. 6257, T.I.A.S. 6577.[2]

STATEMENT OF THE CASE

Petitioner Hector Marroquin Manriquez (hereinafter "Marroquin" or "Petitioner") is seeking asylum pursuant to § 208 of the INA, 8 U.S.C. § 1158, and withholding of deportation pursuant to § 243(h) of the INA, 8 U.S.C. § 1253(h), because he fears he would be persecuted for his political beliefs if he were deported.

Marroquin is a 29 year old citizen of Mexico and a Marxist. In 1974 he was falsely accused by Mexican police of involvement in criminal activity and political terrorism. Believing that he could not receive a fair trial in Mexico and fearing extralegal persecution, he fled to the United States.

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2 The texts of the statutes and rules involved are set out verbatim in Appendix E to this Petition.

Marroquin first became a political activist while a student at the University of Nuevo Leon. At that time many Mexican campuses were embroiled in political ferment. On numerous occasions he witnessed police and paramilitary forces harshly suppress peaceful student protests. (A.R. 233-35, 846-52).[3]

In January 1972, Marroquin witnessed a police assault on student activists in which his roommate and close friend Jesus Rivera was murdered. (A.R. 239-41). Authorities later attempted to justify their unprovoked slaying of Rivera by branding him a "terrorist," a charge which Marroquin knew to be "absolutely false." (A.R. 248).

To protest the slaying of Rivera, Marroquin helped to organize a mass peaceful demonstration of three or four thousand students. This demonstration was also attacked by police using tear gas and clubs. (A.R. 250).

Firmly committed to transforming society through mass organization and education, Marroquin became a founding member of the Student Revolutionary Committee (CER). However, when, in response to continued government repression, some CER leaders began to believe that guerrillaism was the only effective means of achieving change, Marroquin severed all connections with the organization. (A.R. 268, 269, 851).

On January 17, 1974, Marroquin learned that a university librarian, Joel Rojo Hernandez (hereinafter "Rojo"), had been assassinated. (A.R. 271-72). His shock at the news was combined with the fear that police would use the Rojo assassination as a pretext for another crackdown on student activists. His fears were soon borne out by reports that many students had been arrested and some tortured by police investigating the Rojo murder. Two days later, Marroquin saw his picture on the front page of the local newspaper accompanied by an article reporting that police had named him as a leader of an alleged

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3 References to "A.R." are to pages in the administrative record which was filed in the court of appeals.

terrorist organization which was implicated in the Rojo murder. (A.R. 814-16). The charges against Marroquin were completely false. (A.R. 280).

Marroquin immediately sought legal assistance. (A.R. 282; 406-07). The lawyer consulted told Marroquin that he could not receive a fair trial in Mexico, and advised him to flee as soon as possible. (A.R. 289, 407-08). Fearing for his safety, Marroquin sought refuge with relatives in Baja California. (A.R. 289). While in Baja, Marroquin received word that he was being sought by Monterrey authorities who were continuing to arrest and torture student activists. His name and picture also began appearing on lists of "subversives" distributed by the Mexican government. (A.R. 292-93). These developments prompted his fiancee to urge him to leave the country. (A.R. 409). Knowing that his life and safety were in jeopardy in Mexico, he and his new bride entered the United States on April 9, 1974.

Marroquin settled in Houston, where he worked as an assistant bartender at the Barbary Coast bar under the name "Robert Zamora." While in Houston he followed the news from Mexico in the Monterrey press. He read that Monterrey authorities had accused him of participating in an April 23, 1974 "shoot out" between police and members of a "subversive group." (A.R. 833). On the day in question Marroquin was at work in Houston—a fact which is proven by wage slips he received for that day from the Harold Farb Construction Company, owner of the Barbary Coast bar, and his wife's testimony. (A.R. 300, 834-35).

From articles which appeared several months later, Marroquin learned (A.R. 323) that Monterrey police had issued an "all-points bulletin" on him and nineteen others (A.R. 877) who had allegedly been "identified" as perpetrators of various crimes and "members of the [terrorist] 23 of September League." Monterrey Police Chief Carlos Solana was quoted as saying that these individuals "are . . . 'extremely dangerous', since . . . it has been proven" that each of the fugitives is guilty of many crimes. (A.R. 877).

In September 1974, Marroquin read that he had been accused of participating in an armed guerrilla assault and robbery of a bread factory. (A.R. 891). When this incident allegedly took place, Marroquin was hospitalized in Galveston, recovering from a fractured leg and pelvis and punctured lung suffered in an automobile accident. (A.R. 338-39). During his convalescence in a hip-to-toe cast, he read that he had been accused of training a guerrilla "commando" force of eleven high school students known as the "10 of March Revolutionary Batallion." (A.R. 909).

In 1976, Marroquin again sought legal advice to determine whether the political climate in Mexico had altered sufficiently so that he could clear himself of the false charges against him. After the first attorney he consulted had been frightened off the case by police (A.R. 351-52), Marroquin contacted Guillermo Andrade Gressler, a noted Mexican constitutional lawyer. Gressler told Marroquin:

> there was no possibility of receiving any kind of guarantee if he turned himself in voluntarily, since I was and am aware that in cases such as his there is brutal repression, even though one may not have participated in the crimes one is accused of. I advised him at that time to seek to regularize his status as an alien in the United States, since otherwise his life would be in danger. . . . The Monterrey police under Solana were pursuing Hector fiercely. I know of many cases similar to that of Hector Marroquin Manriquez, in which innocent persons have been tortured and convicted.

(A.R. 938-40).

In September 1977, Marroquin traveled incognito to Mexico to meet again with Gressler. On his return, he was arrested by the INS at the port of entry in Eagle Pass, Texas. (A.R. 359-60). Approximately one week later, without representation by counsel, Marroquin pled guilty to illegally entering the United States.

On October 16, 1977, Petitioner filed an asylum request, which was denied by District Director Richard Casillas. (A.R. 709-19). On December 13, 1977, Marroquin was served with an Order to Show Cause. A deportation hearing was held in Houston from April 3-5, 1979.

At the deportation hearing Marroquin testified at length regarding his fear of persecution. He described his political activities in Mexico and rebutted all of the false charges which had been levelled against him. He also described the brutal treatment other student activists had received at the hands of the Mexican authorities or its extralegal arm the White Brigade—a terror squad comprised of federal, state and local police agents and army personnel. (A.R. 968-69).

Marroquin's fear of persecution was corroborated by his wife's testimony, newspaper articles detailing the false charges against him and evidence showing that Marroquin had been in Texas at the time he is alleged to have committed crimes in Nuevo Leon.

Robert Goldman, Dean of American University School of Law, and Rosario Ibarra de Piedra, founder of the Committee for the Defense of Political Prisoners, the Politically Persecuted, Disappeared and Exiled, also testified to the pattern of torture, illegal detention, "disappearance" and execution of political dissidents that had been pervasive in Mexico. (A.R. 428-518, 524-604, 954-1001, 1005-14 and 1043-1116).

Dean Goldman described the 1978 report entitled "Report of the Commission of Enquiry to Mexico," which he co-authored, and its detailed findings regarding 120 political activists who had been tortured into confessing illegal acts. The Report noted that with the exception of a small number of self-admitted guerrillas,

> the great majority of the other prisoners interviewed charge that they were tortured by Government agents into implicating themselves in criminal acts which they, *in fact*, did *not* commit. . . . The prisoners also advised us that

> these coerced confessions were, with few exceptions, the *only* proof adduced by the prosecutors to convict them. . . . The defense lawyers with whom we have spoken have confirmed the substance of these charges. Convictions on the basis of such "confessions" *alone* has been the *rule* and not the exception.

(A.R. 975-76. *See also*, A.R. 1141-64).

The Commission of Enquiry also confirmed that the White Brigade was responsible for the illegal detention, torture and disappearance of many political dissidents in Mexico. It concluded that a considerable number of political activists had been, and continued to be, held in secret detention centers throughout the country, despite repeated government denials. (A.R. 970-71). Rosario Ibarra de Piedra also testified that over 400 political activists, including her own son, had been "disappeared" by authorities, never to be seen again. (A.R. 534).

Counsel for Marroquin also introduced the 1976 Mexico Mission Report (A.R. 1015-42) of the Nobel Peace Prize-winning organization Amnesty International (hereinafter "AI"). (A.R. 441). The AI report stated that illegal detention of political dissidents without charges or trial was commonplace "to the point of being routine;" that "there is strong evidence that the authorities indeed practice extra-legal detention, not unreasonably characterized by the victims and their families as 'kidnapping;' " that those "kidnapped" frequently reappear as dead bodies by the wayside or at police headquarters, where "authorities clai[m] that the detainees committed suicide;" and that political prisoners are routinely subjected to "torture." (A.R. 1026). Other reports in evidence corroborated this pattern of political persecution in Mexico. *See, Amnesty International Report*, 1977 (A.R. 1043-46), Department of State, *Report on Human Rights Practices in Countries Receiving U.S. Aid* (1979). (A.R. 1006-7).

Through expert testimony and these authoritative reports, Marroquin fully demonstrated below that political activists—

including those accused of committing the very same crimes as Marroquin (A.R. 836-41, 923-25, 824-28, 868-74, 1100-10)—were "routinely" subjected to extralegal torture, detention and death because of their political opinions.

Substantial evidence was also introduced which showed that the 1978 Mexican Amnesty Law had not lessened the persecution of political activists. Petitioner introduced AI's November 1978 Action Paper for the Mexican Disappeared (A.R. 1165-66), which stated that "some of those amnestied have either immediately disappeared or been re-arrested" and that the amnesty had not stopped the White Brigade and other paramilitary "security" groups.

Both expert witnesses testified that the amnesty law had had no impact on government repression of political dissidents. Dean Goldman characterized the amnesty as an "illusory protection" (A.R. 500); and Ms. Ibarra de Piedra labeled it a "farce." (A.R. 584).

In order to obtain further evidence that Marroquin had been singled out for political persecution by government officials, counsel for petitioner requested issuance of a subpoena *duces tecum* to the FBI legal attache in Mexico City for production of documents on Marroquin. In support of this request, counsel introduced evidence documenting FBI collaboration with Mexican officials in counterintelligence operations aimed at silencing Mexican political activists, and other documents showing an FBI interest in Marroquin. These documents show that the FBI worked with Mexican authorities in an operation entitled Counterintelligence Program—Border Coverage Program (A.R. 1203-28), in order to control "subversive groups" in Mexico by "utilizing disruptive or discrediting tactics . . . on Communist groups, . . . individual communists" and other leftists. *Id* at 1203. To accomplish these objectives, the FBI and Mexican authorities resorted to the use of "frame-up" charges, agent provocateurs and various other "dirty tricks." (A.R. 1229-55).

FBI documents relating specifically to Marroquin indicate that the Bureau first opened a dossier on him as a "Pro-Communist Student" (A.R. 1257-58) when he was fifteen years old. At that time Marroquin's sole political activity had been his participation in a peaceful demonstration in his hometown of Matamoros, protesting the 1968 slaying of 500 student demonstrators by the Mexican army. (A.R. 230-31). Although almost wholly redacted, other FBI documents indicate that the agency also displayed considerable interest in Marroquin in April, 1974 when Mexican police were circulating false accusations against him. Because the unexpurgated documents may well show a joint effort by the FBI and Mexican officials to victimize Marroquin, counsel for petitioner sought limited discovery of these documents to substantiate his claim for asylum. Immigration Judge James R. Smith denied the request on the grounds that these documents would show "at most" that Marroquin "was politically active in Mexico" and that it was unlikely the Department of Justice would declassify them at the request of an immigration judge. (App. C at A-61-2).

Despite the substantial evidence of persecution presented at the hearing, Judge Smith held that Marroquin had failed to establish that he would be persecuted if deported. (*Id.* at A-77). While acknowledging the existence of political repression in Mexico (*Id.* at A-69-72), Judge Smith concluded that it was unlikely that Marroquin himself would be threatened because: (1) the 1978 amnesty law had been enacted (*Id.* at A-72), (2) four other members of the CER had been released from prison after five years detention (*Id.*), (3) Marroquin had entered Mexico undetected in 1977 without being victimized (*Id.* at A-72-3), (4) Marroquin's supporters "undoubtedly would remind the Mexican authorities that such a celebrity should not disappear" (*Id.* at A-71), and (5) neither Marroquin nor his family had ever been "arrested, jailed, nor in any way persecuted" in Mexico. (*Id.* at A-68).

The Board of Immigration Appeals (hereinafter the "BIA" or the "Board") affirmed the denial of asylum and withholding of deportation, finding that Marroquin had failed to demon-

strate "a clear probability" that he would be persecuted in Mexico. (App. B at A-44). The Board dismissed as "general background" the extensive evidence showing a pattern of government persecution of political dissidents (*Id.* at A-27-8) and found that since "at most only a handful [of Marroquin's colleagues] allegedly may have been the object of purely political persecution" it was unlikely that Marroquin himself would face persecution (*Id.* at A-28). The BIA also opined that Mexican police had had only a "passing" interest in the petitioner, and that the "only apparent outstanding charge" against him (for participation in the April 1974 "shoot-out") had not been "satisfactorily" disproved. (*Id.* at A-32-3). The Board also agreed with the Immigration Judge that conditions in Mexico had improved. (*Id.* at A-39). It noted, finally, that Marroquin's own expert witness, Dean Goldman, could not state "conclusively" that Marroquin would be persecuted if deported. (*Id.* at A-44).

Pursuant to 8 U.S.C. § 1105(a), Marroquin appealed the BIA's decision to the United States Court of Appeals for the Third Circuit. In an opinion dated January 27, 1983, a panel of the court affirmed the decision of the administrative agency. (App. A).

The panel's decision was explicitly in conflict with the decision of the Second Circuit Court of Appeals in *Stevic v. Sava,* 678 F.2d 401 (2d Cir. 1982), *cert. granted,* 51 U.S.L.W. 3627 (U.S. March 1, 1983), in which this Court has granted review and also conflicts with the decision of the Court of Appeals for the Sixth Circuit in *Reyes v. INS,* 693 F.2d 597 (6th Cir. 1982). Both these courts held that the Refugee Act of 1980, Pub. L. 96-212, 94 Stat. 102 (1980) (hereinafter "1980 Act") had reduced the burden of proof required to establish eligibility for asylum or withholding of deportation by requiring a showing "far short" of "clear probability" of persecution, denominated as a "well-founded fear of persecution." By contrast the court below concluded that the "clear probability" test was still applicable and that it, like the "well-founded fear" standard would be satisfied by "objective evidence which

demonstrates the realistic likelihood" of persecution. (App. A at A-9). Applying the "clear probability" test, the court held that Marroquin had failed to meet his burden because: (1) "[t]here is no *compelling* reason to believe that the [petitioner] would not receive a fair trial in Mexico" (*Id.* at 9) (brackets in the original) (emphasis supplied); (2) Dean Goldman "was unable to 'state conclusively' . . . that petitioner would be subject to political persecution (*Id.* at 10); (3) the amnesty law "probably diluted" some of Marroquin's fears (*Id.* at 10); and (4) Marroquin's family has not been molested in Mexico.

In delineating the scope of its judicial review, the court below rejected the substantial evidence test applied by the Ninth Circuit in *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981) and the Sixth Circuit in *Reyes v. INS*, 693 F.2d 597 (6th Cir. 1982) and reviewed the record under the abuse of discretion standard.

Finally, the court upheld the immigration judge's denial of a subpoena *duces tecum* because it concluded that he had made a "realistic determination" which was neither an abuse of discretion nor a violation of due process.

REASONS FOR GRANTING THE WRIT

1. By affirming the use of the "clear probability" test the court below has ignored the mandate of Congress and all but closed the door on refugees seeking asylum in the United States to escape persecution. This decision is in direct conflict with the decisions of two other courts of appeals in *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3627 (U.S. March 1, 1983) and *Reyes v. INS*, 693 F.2d 597 (6th Cir. 1982). These two courts of appeals have held that the Refugee Act of 1980 reduced the burden of proof imposed on refugees seeking withholding of deportation so that anyone demonstrating a "well-founded fear of persecution" is entitled to relief. By contrast the Third Circuit found that the " 'well-founded fear' standard equates with the 'clear probability of persecution' standard formerly employed" (App. A at A-7-8) and

concluded that the 1980 Act had left the burden of proof unchanged.

If the decision below is allowed to stand the humanitarian purpose of the 1980 statute will be nullified and many refugees deserving of sanctuary will be condemned to face persecution at the hands of repressive regimes.

Based on a thorough analysis of legislative history and administrative case law, the Second Circuit in *Stevic* held that the 1980 Act had significantly liberalized asylum law by adopting the standard of eligibility articulated in the United Nations Protocol on the Status of Refugees, 19 U.S.T. 6257, T.I.A.S. 6577, which guaranteed protection for refugees having a "well founded fear of persecution."

Under this new, more lenient standard, the court concluded:

> asylum may be granted, and under § 243(h), deportation must be withheld, upon a showing far short of a 'clear probability' that individual will be singled out for persecution.

Stevic, 678 F.2d at 409. *Accord, Reyes*, 693 F.2d at 599-600.

Analyzing the 1980 Act, *Stevic* found that Congress had eased the requirements imposed on refugees by explicitly conforming the language of the immigration statute to that of the Protocol, making withholding of deportation mandatory rather than discretionary, and creating a new uniform asylum provision.

The legislative history of the 1980 Act demonstrates that Congress intended to conform the immigration statute to the language of the Protocol. The Conference Report on the 1980 legislation explicitly states that the new § 243(h) "is based directly upon the language of the Protocol and it is intended that *the provision be construed consistent* with the Protocol." H.R. Conf. Rep. No. 96-781, 96th Cong., 2d Sess. 20 (1980) (emphasis supplied).

After analyzing the Protocol, the *Stevic* court concluded that its protection was "more generous" than that provided by the " 'clear probability' test." *Id.* at 409. Under the Protocol, "[t]he applicant's state of mind is . . . relevant, as are conditions in the country of origin, its laws, and the experiences of others." *Id.* at 406. By conforming the statute to the language of the Protocol, the court concluded, Congress intended to adopt the more lenient "well-founded fear" of persecution standard. *Id.* at 409-410.

Finally, the *Stevic* court found its conclusion further bolstered by the fact that the 1980 Act created a uniform provision which consolidated two strands of asylum law. Previously, persons seeking withholding of deportation under § 243(h) had to show a "clear probability" of persecution, while those seeking to enter the United States from "Communist dominated" countries or nations of the Middle East had only to show "good reason" to fear persecution. Now a single standard of eligibility would apply to all. *Id.* at 408; *see* 8 U.S.C. § 1158. (App. E at A-84-5).[4] In unifying the two provisions, the Second Circuit concluded, Congress intended the lesser burden to prevail. *Id.* at 409.

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4 The difference between the two standards was also reflected in the administrative case law. Prior to the passage of the 1980 Act, applicants for withholding of deportation under § 243(h) had to show a far greater likelihood of persecution than did refugees seeking asylum from communist countries under the former § 203(a)(7) of the INA, 8 U.S.C. § 1153(a)(7). *Compare Matter of Joseph*, 13 I & N Dec. 70 (BIA 1968) ("clear probability test" used to judge applications for § 243(h) relief) *with Matter of Ugricic*, 14 I & N Dec. 384, 384-86 (BIA 1972) ("good reason" to fear persecution standard applied in granting asylum to refugees from communist countries under § 203(a)(7)). Indeed, on several occasions the BIA specifically rejected the contention that the 1968 ratification of the Protocol had brought the eligibility requirement of § 243(h) into conformity with the more lenient standard of § 203(a)(7). *Matter of Tan*, 12 I & N Dec. 564, 569-70 (BIA 1967); *Matter of Janus & Janek*, 12 I & N Dec. 866, 876 (BIA 1968).

> We believe Congress' sympathy with the plight of refugees such as the "boat people" is relevant. The general purpose of the Act is to regulate, not hinder, their entry. The Act:
>
> > reflects one of the oldest themes in America's history—welcoming refugees to our shores. It gives statutory meaning to our national commitment to human rights and humanitarian concerns. . . .
>
> In the context of that humane attitude, it would bring about wholly anomalous results to read the Act to impose a far more stringent legal test upon entry by refugees than had existed in prior law.

Id. Without elaborating on the exact contours of the new requirements, the *Stevic* court held that § 243(h) relief must be granted "upon a showing far short of a 'clear probability' " of persecution, *id.*, which takes into account the applicant's fear of persecution and the "reasonableness" of that fear. *Id.* at 409-10.

In *Reyes v. INS*, 693 F.2d 597, 599 (6th Cir. 1982) the Sixth Circuit agreed with the Second Circuit's decision in *Stevic* and held the "well-founded fear" test to be "consistent with the tenor and spirit, if not the language" of the 1980 Act. In *Reyes*, a citizen of the Philippines seeking asylum and withholding of deportation had been denied relief by the BIA for failing to meet the "clear probability" test. To support her claim she testified that in 1974 or 1975—when she was 13 or 14 years old—she had participated in anti-Marcos activities and had been detained for two or three days for questioning. *Id.* To corroborate her fear of persecution, she submitted news articles and affidavits documenting the general repression in the Philippines and two letters relating to herself—neither of which were from Philippine government sources—which advised her not to return to the Philippines. *Id.* None of her family members had ever been persecuted. *Id.* The evidence of threatened persecution in *Reyes* was considerably less than that presented herein.

Reversing the BIA decision, the Sixth Circuit stated:

> Since the Board applied the more stringent clear-probability test, the holding cannot stand. It is admitted that there is some evidence that Reyes may be subject to persecution. All the Board held was that she had not shown, by a clear probability, that she would specifically be subject to it. Since something less than that showing is now required, we find that the Board erred.

Id. at 599-600. Thus the court held that where objective evidence showed both a repressive environment and good reason to believe the individual would be in jeopardy, a "well-founded fear" of persecution had been established. *Id.* at 600. Granting Reyes both asylum and withholding of deportation, the court concluded that "it is difficult to see what more than what was offered here we would require, short of proof of actual persecution after the fact." *Id.*

Similarly, the Ninth Circuit held that a Provisional Irish Republican Army (PIRA) defector had shown a "likelihood of persecution" sufficient to obtain § 243(h) relief, by demonstrating "first, that PIRA systematically tortures and murders traitors; second, that McMullen is perceived as a traitor; and finally, that the government of the Republic of Ireland is unable to control the PIRA." *McMullen v. INS*, 658 F.2d at 1317 (9th Cir. 1981).

In sum, the courts of appeals in *Stevic*, *Reyes*, and *McMullen* have all concluded that a noncitizen who demonstrates a pattern of persecution of others similarly situated, and "good reason to believe" he would be subjected to the same treatment, is entitled to § 243(h) relief.

The evidence of record shows that Marroquin has more than met this burden. Petitioner has demonstrated both that dissident political activists in Mexico have been "routinely" subjected to torture, "disappearance," and even summary execution, and that he himself has been falsely accused of

crimes solely because of his political ideas.[5] In light of the powerful showing that was made below, it is "difficult to see what more than what was offered here [could be] require[d] short of proof of actual persecution after the fact." Under the "well-founded fear" test upheld by the courts of appeals in *Stevic*, *Reyes* and *McMullen*, Marroquin is entitled to relief.

The lower court's application of the law to the facts herein belies its contention that the "well-founded fear" test is identical to the "clear probability" standard. The court denied relief to Marroquin because it found no "*compelling* reason to believe [that he] . . . would not receive a fair trial in Mexico . . ." and because his own expert witness could not state "*conclusively*" that he would be persecuted if deported. (App. A. at A-9, A-10) (emphasis added).

If the "clear probability" test cannot be satisfied unless a noncitizen demonstrates "conclusively" and by "compelling" evidence that he will be persecuted—a burden nearly impossible to meet before persecution has actually occurred—the "clear probability" standard affirmed by the court below is far more onerous than the "well-founded fear" test embodied in the 1980 Act. Use of this standard deprives deserving refugees of the relief from deportation to which they are entitled.

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5 Findings by both the court of appeals and the BIA which downplay the pervasive persecution of political activists in Mexico and the frame-up character of charges brought against Marroquin, are wholly contradicted by the undisputed evidence of record. The conclusion of both the court and the BIA that the 1978 amnesty law lessened government persecution of activists and "probably diluted" Marroquin's fears of persecution, is refuted by the Amnesty International reports and the testimony of both expert witnesses. The BIA's finding that Marroquin had not "satisfactorily" disproven the "shoot-out" charge is equally unsustained by the record. Both the testimony of petitioner's wife and the wage slips presented, establish that Marroquin was in Houston at the time of this alleged "shoot-out." It is hardly "inexplicable," as the Board contends that wage slips issued by a bar, owned by the Harold Farb Construction Company, would identify the construction company as the employer. (*See* App. B. at A-35).

In light of the significant factual record supporting Marroquin's fear of persecution and the conflict between the decision of the court below and that of other courts of appeals, certiorari should be granted so that this Court can properly define the burden of proof to be imposed on noncitizens seeking asylum and withholding of deportation.

2. The court of appeals also abdicated its responsibility to insure the proper exercise of § 243(h)'s mandatory relief provisions by refusing to disturb the BIA's findings in the absence of an "abuse of agency discretion." (App. A at A-8-9). The court concluded that limited judicial review was appropriate because administrative expertise is required to determine whether a noncitizen's life or freedom would be threatened.[6] Here again, its opinion on a principle of law directly conflicts with the recent decisions of the Court of Appeals for the Sixth Circuit in *Reyes v. INS*, 693 F.2d at 599, and the Court of Appeals for the Ninth Circuit in *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981). *See also, Stevic v. Sava*, 678 F.2d at 410.

In *McMullen v. INS, supra*, the Ninth Circuit carefully analyzed the effect of the 1980 changes in § 243(h) on the scope of judicial review and concluded that the BIA's findings could not be upheld unless "supported by reasonable, substantial and probative evidence." *Id.* at 1316. The *McMullen* court reasoned:

> Agency findings arising from public, record-producing proceedings are normally subject to the substantial-evidence standard of review. . . . The INS does not cite any portion of the legislative history of the 1980 amendment

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6 In reviewing the record to determine whether petitioner had satisfied the "clear probability" test, the court below observed that the BIA's findings could be sustained under either an abuse of discretion or substantial evidence review. (App. A at A-8, n.5). However, if this Court were to determine that the lesser "well-founded fear" standard was applicable, it could either reverse based on its own finding that the agency's determination was not supported by substantial evidence or remand to the court below for a determination of that issue.

> which suggests that, contrary to normal principles of administrative law, § 243(h) factual findings are discretionary.
>
> We conclude that factual findings under § 243(h) are subject to review under the substantial evidence test.

Id. (citations omitted). The *McMullen* analysis was recently followed in *Reyes v. INS*, 693 F.2d at 599, where the Sixth Circuit reversed the Board's denial of § 243(h) relief because its decision was not supported by substantial evidence in the record as a whole. *Id.* at 600.

Certiorari should be granted to address this conflict and to preserve the right of noncitizens with a well-founded fear of persecution to obtain asylum and withholding of deportation.

3. By denying petitioner's request for the issuance of a subpoena *duces tecum*, the court below deprived petitioner of the fundamental due process right to secure evidence essential to prove his claim.

On many occasions this Court has held that noncitizens who are present in this country are entitled to due process of law in deportation proceedings. *See, e.g., United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927); *The Japanese Immigrant Case*, 189 U.S. 86, 100-101 (1903); *see also, Wong Yang Sung v. McGrath*, 339 U.S. 33, 49-50 (1950); *Bridges v. Wixon*, 316 U.S. 135, 153-54 (1945).

Most recently, in *Landon v. Plasencia*, ___ U.S. ___, 51 U.S.L.W. 4001, 4004-05 (U.S. Nov. 15, 1982) the Court stated:

> [A] continuously present resident alien is entitled to a fair hearing when threatened with deportation, . . . and . . . has a right to due process in such a situation. . . . The constitutional sufficiency of procedures provided in any situation . . . varies with the circumstances. . . . In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the

> procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.

In the instant case, the court of appeals acknowledged that "Marroquin has a substantial liberty interest at stake." (App. A at A-11). If his request for relief is denied the consequences to him may be grave indeed. Not only does "he stan[d] to lose the right 'to stay and live and work in this land of freedom . . . ,' " *id.*, but he also faces the likelihood that his life and freedom will be forfeited.

While petitioner's interest in securing the issuance of this subpoena *duces tecum* is of great magnitude, the government's interest in depriving him of it is negligible, because INS regulations already empower the immigration judge to issue subpoenas for the production of "essential" evidence. 8 C.F.R. § 287.4 (App. E at A-86-7). By denying Marroquin the opportunity to secure critical evidence to corroborate his "well-founded fear" of persecution the court below deprived him of his Fifth Amendment right to due process of law. Certiorari should be granted to prevent this violation of constitutional principles.

CONCLUSION

This case raises the same issue posed in *Stevic v. Sava*, No. 82-973, *cert. granted*, 51 U.S.L.W. 3627 (U.S. Mar. 1, 1983), but presents a more substantial record upon which this Court can clarify the standard of eligibility for withholding of deportation and asylum. This petition also raises two other issues which must be resolved to assure the fair administration of the immigration law. Accordingly, the petition for certiorari should be granted and this case heard in conjunction with *Stevic*.

Respectfully submitted,

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April, 1983

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3163

HECTOR ANDRES MARROQUIN-MANRIQUEZ,
Petitioner

v.

The IMMIGRATION and NATURALIZATION SERVICE,
Respondent

PETITION FOR REVIEW
BOARD OF IMMIGRATION APPEALS

Submitted Under Rule 12(6)
January 7, 1983

Before: ALDISERT, GIBBONS, and HIGGINBOTHAM, *Circuit Judges*.

(Filed January 27, 1983)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

This petition for review of a Board of Immigration Appeals order presents two major questions: whether petitioner met his burden of proof that he would be subject to political persecution if deported to Mexico; and whether the immigration judge abused his discretion in denying petitioner's discovery motions. We conclude that there was no reversible error, and deny the petition for review.

I.

Hector Andres Marroquin-Manriquez, a native and citizen of Mexico, entered the United States on September 18, 1977, representing that he was a citizen of the United States. Upon questioning by border officials, he admitted that he was a Mexican citizen and that the documents that he presented purporting to show that he was a United States citizen were fraudulent. Two days later he was tried and convicted of violating 8 U.S.C.

§1325[1] in obtaining entry into the United States without inspection and by a willfully false representation. Thereafter, INS issued a rule to show cause why petitioner should not be deported.[2]

Prior to the hearing, however, Marroquin petitioned for political asylum. Upon inquiry, the Department of State gave its opinion that petitioner did not qualify for asylum, and on December 21, 1978, the INS district director denied his petition. Petitioner then asked the immigration judge to issue letters rogatory to two Mexican officials and a subpoena duces tecum to the legal attache at the American Embassy in Mexico City. These requests also were denied.

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1. Section 1325 provides:

> Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than $500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than $1,000, or both.

2. Section 241 of the Immigration and Nationality Act provides:

> (a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who —
>
> . . .
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States
>
> . . . .

8 U.S.C. §1251(a)(2).

At his hearing, Marroquin admitted that he was a citizen of Mexico, that he had attempted enter the United States using false documents, and that he had been convicted under 8 U.S.C. §1325. On the basis of these admissions, the immigration judge held that deportability had been established.

The principal focus of the hearing was petitioner's request for asylum and application for withholding of deportation under §243(h) of the Immigration and Nationality Act, 8 U.S.C. §1253(h). He produced testimony disclosing that, as a university student, he had been a member of the Student Revolutionary Commission (CER) which was involved in protesting conditions at the University of Nuevo Leon in Monterrey, and that he later became a Marxist. Petitioner testified that in 1974 he had learned of the murder of a fellow member of the CER, that a subsequent newspaper article linked petitioner to the killing, and that upon recommendation of an attorney, he had gone to Baja, California, to stay with relatives. He said that while there he made his decision to leave Mexico for the United States. He testified that he did not go to the American Embassy to seek asylum because he had read in a book that American agents were involved with Mexican authorities in connection with a certain student demonstration.

He testified further that he had entered the United States on April 9, 1974, and traveled to Houston, Texas, where he worked in a bar under the name of Roberto Zamora, that on April 23, 1974, an article appeared in a Mexican newspaper describing a shootout in Mexico between police and four individuals, and that he was identified as one of the four. He denied any involvement in this shooting incident, stating that he was working in Houston at the time. He submitted pay stubs in the name of Roberto Zamora showing Houston employment during the particular week. He also testified that he travelled to Mexico in June 1977 to meet with an attorney about the likelihood of a fair trial on the shooting esca-

pade if he surrendered to Mexican authorities. Petitioner testified that the attorney told him that a fair trial was impossible and that he should stay out of Mexico.

Upon cross-examination he testified that his wife, who lives in Mexico, shares his political views, and that, although the Mexican government discriminates against Marxists, his wife has suffered no persecution. He further testified that he has never been persecuted or jailed in Mexico, that neither his mother nor any of his brothers and sisters has suffered any harassment by the authorities.

Robert K. Goldman, Professor of Law at American University, active in the civil rights movement, testified as an expert witness on petitioner's behalf. He reported that approximately 100 alleged political prisoners who he had interviewed in Mexico all claimed that they had been illegally detained by a so-called "white brigade" or "brigada blanca" made up of government agents. He said that the prisoners alleged that they had been tortured and that most of them alleged that they had been coerced to confess to crimes they did not commit. Notwithstanding his accounts of political persecution in Mexico, however, when asked if in his opinion, Marroquin had a well-founded fear of persecution, Professor Goldman responded that he could not conclusively state one way or the other. Mrs. Rosario Ibarra de Piedra, founder of a committee involved in investigating political incarceration, also offered her opinion that petitioner would be kidnapped and tortured if returned to Mexico. Roger Rudenstein, executive director of the Political Rights Defense Fund, testified that he had received and processed 50,000 documents from the Federal Bureau of Investigation pertaining to the general operations of the FBI in Mexico, and that in his view they would show numerous illegal acts by the FBI. He offered the opinion that the FBI had a hand in what he called the "frame up" of petitioner.

Relying upon petitioner's admission of the use of fraudulent documents upon entering the United States and his subsequent conviction, the immigration judge held that petitioner was deportable as charged. In denying the request for withholding of deportation, the judge noted that neither petitioner nor his family had ever been persecuted in Mexico, that Mexico had enacted an Amnesty Law[3] for political prisoners in 1978, that petitioner had received considerable exposure on a speaking tour throughout the United States, and that he presumably had friends who would speak on his behalf to the Mexican authorities. The immigration judge also noted that other members of the CER had been released from custody, that petitioner had made several trips to Mexico without being apprehended, and that he had been in the United States for three years without applying for political asylum. The judge credited Professor Goldman and Mrs. Piedra's testimony that there was some prosecution of political dissidents in Mexico, but determined that the record as a whole did not sustain the claim that Marroquin himself would be persecuted upon his return to Mexico.

On appeal the Board of Immigration Appeals held that petitioner was estopped by his §1325 conviction from contesting his deportability. With respect to the persecution claim, the Board determined that although

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3. The Law provides amnesty, *inter alia*

> In those cases involving attempts against another person's life, bodily harm, terrorism and kidnapping, the benefits of amnesty can be extended to those who, according to the opinion of the Attorney General of the Republic and the Attorney General for the Federal District, in accordance with the reports provided by the General Bureau of Coordinated Services for Prevention and Social Rehabilitation of the Interior Secretariat to the effect that said persons had indeed, taken part in committing these actions but who do not reveal a high degree of danger.

D.O. Sept. 28, 1978, informal translation *reprinted* in app. at 945.

there was evidence suggesting that there may have been some political repression and persecution in Mexico, this evidence did not demonstrate the likelihood that the petitioner himself would be subject to persecution. The Board found that, although petitioner had been mentioned in Mexican newspaper articles, the Mexican police are officially interested in the petitioner with respect to only one episode, the alleged shootout with police on April 23, 1974. The Board determined that petitioner had not satisfactorily established that he was not involved in the incident and that, even if the charges were false, he had not shown that he could not get a fair trial in Mexico.

In his petition to this court, Marroquin contends that the Board employed an incorrect burden of proof, that he adequately demonstrated that he would be persecuted upon his return to Mexico, that the immigration judge's denial of his requests for letters rogatory and a subpoena duces tecum was a violation of due process, and that he did not enter this country without inspection or under false pretenses.

II.

Petitioner contends first that the Board applied an erroneous burden of proof. Relying on *Stevic v. Sava*, 678 F.2d 401 (2d Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3484 (U.S. Dec. 10, 1982) (No. 82-973), he argues that although the Board required him to demonstrate a "clear probability" of persecution, recent amendments require a less stringent standard, "well founded fear." Petitioner apparently has overlooked our recent decision in *Rejaie v. INS*, 691 F.2d 139 (3d Cir. 1982), in which we rejected *Stevic*'s analysis and concluded that the new "well founded fear" standard equates with the "clear probability of persecution" standard formerly em-

ployed.[4] Therefore, we find no error in the Board's use of the "clear probability" standard.

III.

Alternatively, petitioner argues that he met his burden of proof, even if denominated "clear probability." On judicial review of a final order of deportation, the standard of review is whether the Board of Immigration Appeals' denial of petitioner's request for withholding of deportation under §243(h) of the Immigration and Nationality Act, 8 U.S.C. §1253(h), was an abuse of discretion.[5] We will not disturb the Board's exercise of discretion unless we find "it is arbitrary, irrational or contrary to law." *So Chun Chung v. INS*, 602 F.2d 608, 612 (3d Cir. 1979).

Limitations on deportation of one who requests asylum are set forth in §243(h) of the Act:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. §1253(h)(1).

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4 Indeed, in this case the Board used the two phrases interchangeably. *See* app. at 3, 11.

5 We are aware that the Ninth Circuit in *McMullen v. INS*, 658 F.2d 1312 (9th Cir. 1981), held that because the Attorney General has no discretion to deny asylum where deportation would endanger life or liberty, the appropriate standard of review was the "substantial evidence" test. We reject this conclusion because it ignores the necessary application of expertise implicated in the determination that a fear of persecution is well-founded. Given the facts of this case, however, we would uphold the agency's determination under either standard.

In *Rejaie* we delineated the specifics of the burden of proof placed upon an alien seeking asylum:

> [T]he Board takes into consideration an alien's apprehensions of persecution, but also requires him to produce objective evidence which demonstrates the realistic likelihood that he, or a class to which he belongs will be persecuted. Generalized, undocumented fears of persecution or political upheaval which affect a country's general populace are insufficient bases for withholding deportation under §243(h).

691 F.2d at 145.

After a detailed analysis of the evidence adduced in a three-day hearing, the Board determined that petitioner "failed to establish a well founded fear of persecution such that his life or freedom would be threatened [in Mexico] on account of . . . political opinion." Board opinion at 10, *reprinted in* app. at 11.

Upon independent review of the evidence we find no abuse of agency discretion. The Board committed no error of law in determining that petitioner failed to meet his burden and in concluding that "[t]here is no compelling reason to believe that the [petitioner] would not receive a fair trial in Mexico and, if the evidence of his innocence is as convincing as he asserts, be exonerated of the charge." *Id.* at 6,[6] *reprinted in* app. at 7. Particularly

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6. In this respect the Board noted:

> The judicial system of Mexico is generally regarded as among the most advanced and enlightened of all countries in Central and South America. While isolated aberrations to the fair trial norm may occur, the respondent's expert witness law professor also testified to his belief that even in parts of the United States, people are sometimes subjected to persecution and civil rights abuses. Even if so, this of itself would be insufficient reason to presume in advance that a specific instance of persecution would occur here. Similarly, we are unwilling to conclude, and

pertinent is the testimony of petitioner's own expert witness, Professor Robert Goldman, who was unable to "state conclusively one way or the other" that petitioner would be subject to political persecution. Moreover, we agree with the Board that the Mexican Amnesty Law probably diluted many of petitioner's basic contentions. We note the evidence that petitioner's family had not undergone threats, prosecution, or harassment. We now turn to the denial of the discovery requests.

IV.

It is well established that the scope and conduct of discovery are within the sound discretion of the trial court, *Borden Co. v. Sylk*, 410 F.2d 843, 845 (3d Cir. 1969), and that after final judgment of the district court or final agency order, our review is confined to determining if that discretion has been abused. *Montecatini Edison S.p.A. v. E. I. du Pont de Nemours & Co.*, 434 F.2d 70, 72 (3d Cir. 1970). To find such abuse it is usually necessary to conclude that there has been an interference with a "substantial right", *Goldman v. Checker Taxi Co.*, 325 F.2d 853, 856 (7th Cir. 1963), or that the discovery ruling is "seen to be a gross abuse of discretion resulting in fundamental unfairness in the trial of the case." *Voegeli v. Lewis*, 568 F.2d 89, 96 (8th Cir. 1977).

Petitioner contends that the denial of the requested letters rogatory and subpoena duces tecum constituted violation of due process. The due process implications of deportation and exclusion cases recently have been summarized in *Landon v. Plasencia*, ___ U.S. ___, (51 U.S.L.W. 4001, 4004-05, Nov. 15, 1982): An alien seek-

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NOTE — *(Continued)*

the record does not sufficiently show that this individual respondent would be persecuted in Mexico and be unable to obtain a fair trial on the police shoot-out charge against him.

Id. at 607, *reprinted in* app. at 7-8.

ing initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. Once an alien gains admission to our country, however, and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly. A continuously present resident alien is entitled to a fair hearing when threatened with deportation, and has a right to due process in such a situation. The constitutional sufficiency of procedures provided in any situation, varies with the circumstances. In evaluating the procedures in any case, the courts must consider the interest at stake for the individual, the risk of an erroneous deprivation of the interest through the procedures used as well as the probable value of additional or different procedural safeguards, and the interest of the government in using the current procedures rather than additional or different procedures.[7]

Marroquin has a substantial liberty interest at stake. He stands to lose the right "to stay and live and work in this land of freedom." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). Moreover, he argues that he would be persecuted upon his return to Mexico. To vindicate these interests he sought discovery procedures to attempt to prove that his probable prosecution for a street crime will be in reality a persecution for political views.

The government's interest in these cases has been set forth in *Landon v. Plasencia*:

> The government's interest in efficient administration of the immigration laws at the border also is weighty. Further, it must weigh heavily in the balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature. . . . The role of

7. In the view we take in this case, we will assume, without deciding, that the petitioner is a continuously present resident alien entitled to due process protection.

> the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy.

___ U.S. at ___ (51 U.S.L.W. at 4005) (citations omitted). In deportation cases

> the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government. . . .

8 U.S.C. §1252(b)(3). INS regulations provide for the issuance of subpoenas, 8 C.F.R. §287.4 (1982),[8] and in appropriate cases the taking of interrogatories or letters rogatory in foreign countries, generally assimilating the procedure prescribed in the Federal Rules of Civil Procedure which are used as guidelines when practical. §242.14(e). *See In re Vardjan*, 10 I. & N. Dec. 567 (1964); 1A C. Gordon and H. Rosenfield, Immigration Law and Procedure §5.9g (1982); *see also In re McNeil*, 11 I. & N. Dec. 378, 389 (1965) (Federal Rules of Civil Procedure are not controlling in deportation proceedings).

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8 Section 287.4(a)(2) in part provides that

> a district director or a special inquiry officer having jurisdiction over the matter may, upon his own volition or upon application of a trial attorney, the alien, or other party affected, issue subpoenas requiring the attendance of witnesses or for the production of books, papers and other documentary evidence, or both. A party applying for a subpoena shall be required, as a condition precedent to its issuance, to state in writing or at the proceeding what he expects to prove by such witnesses or documentary evidence and to show affirmatively that he has made diligent effort, without success to produce the same. Upon being satisfied that a witness will not appear and testify or produce documentary evidence and that his evidence is essential, the district director or special inquiry officer shall issue a subpoena.

A.

Petitioner requested letters rogatory of Mexican officials Carlos Solano Macias and Hector Villagra Caletti, alleging that their testimony would establish that they deliberately exposed petitioner to torture and assassination, and that they have directed the torture of political prisoners. Marroquin contended that the two officials falsely charged him with complicity in murder of a librarian in Monterrey, Mexico and other crimes occurring after petitioner entered in the United States in April 1974. Rule 28(b) of the Federal Rules of Civil Procedure provides that "a letter rogatory shall be issued on application and notice and on terms that are just and appropriate." In immigration proceedings, a party seeking a letter rogatory has the burden of showing necessity and feasibility. *In re Vardjan*, 10 I. & N. Dec. at 570-72. Thus, we measure the immigration judge's denial against the familiar abuse of discretion standard.

We find no abuse for two discrete reasons, one procedural and one going to the merits of the request. The record indicates that the immigration judge suggested to petitioner that, instead of the more formal letters rogatory,[9] interrogatories and cross interrogatories be prepared. The judge recorded that his suggestion of "expeditious submission" of interrogatories "was declined at the hearing." Opinion at 4, *reprinted in* app. at 177.

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9 Professors Wright and Miller define letters rogatory as

> formal communications in writing sent by a court in which an action is pending to a court or judge of a foreign country requesting that the testimony of a witness resident within the jurisdiction of the latter court may be there formally taken under its direction and transmitted to the first court for use in the pending action. Typically, the letter rogatory will be channelled through the United States State Department and the ministry of justice of the foreign country.

8 C. Wright & A. Miller, Federal Practice and Procedure §2083, at 350 (1970) (footnote omitted).

More persuasive here, however, is that petitioner sought to obtain from these officials statements, against their own interest, that they were violating the law. Considered on the merits, the request sounds more in rhetoric than in substance. *See In re Vardjan*, 10 I. & N. Dec. at 572. Accordingly, with respect to the letters rogatory request, we find no abuse of discretion; *a fortiori*, we find no denial of due process.

B.

Petitioner's requested subpoena duces tecum sought FBI documents from the American Embassy in Mexico City. Petitioner alleged that FBI officials there had knowledge of and illegally participated in the persecution of political opponents of the Mexican government. The immigration judge determined that the FBI does have an interest in communist groups and individual communists, but he noted that petitioner's deportation charge is based upon his entry without inspection, under §241(a)(2), and not under any other provision of §241(a).[10] The judge concluded:

> If Respondent Marroquin's political activity has any relevance in these proceedings it is in the area of his claim to political persecution if returned to Mexico. At the most, in that area, the FBI reports could establish that Respondent Marroquin was politically

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10. For example, this section provides for deportation of:

> Aliens who are members of or affiliated with . . . (iv) the Communist or any other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party, or (vi) the direct precedessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt . . . .

8 U.S.C. §1251(a)(6)(C).

> active in Mexico. I find from the evidence of record that Mr. Marroquin was, at least, politically active in Mexico.
>
> I do not foresee the Department of Justice making public any classified documents because requested by an immigration judge. Nor do I see how, under the facts of this case, that the testimony of the FBI agent in charge in Mexico City is "essential" to a determination of this particular respondent's request for such subpoena.

Opinion at 45, *reprinted in* app. at 177-78. The immigration judge's refusal to issue a subpoena was a realistic determination and not an abuse of discretion nor a denial of due process.[11]

V.

Finally, petitioner contends that he should not have been found deportable on the grounds that he entered the United States without inspection and on a false claim of citizenship. The evidence, he argues, shows that he was stopped and taken into custody prior to entry, and thus never did "enter" the United States. Whatever the validity of petitioner's linguistic analysis, it is clear that he is precluded from offering it here. Petitioner pled guilty to charges under 8 U.S.C. §1325 that he had entered the United States; therefore he is estopped from claiming now that he did not enter the country.

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11. In addition to the reasons set forth by the immigration judge, we note that petitioner had the benefit of the 50,000 FBI documents that his witness Rudenstein obtained under the Freedom of Information Act.

VI.

The petition for review will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. The Legal Intelligencer. Phila., Pa.)

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE

Board of Immigration Appeals

Washington, D.C. 20530

March 23, 1982

File: A19 870 798 -- Houston

In re: HECTOR ANDRES
MARROQUIN-MANRIQUEZ

IN DEPORTATION PROCEEDINGS

APPEAL

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ON BEHALF OF SERVICE:

Daniel Kahn
General Attorney

Gerald S. Hurwitz
Appellate Trial Attorney

ORAL ARGUMENT:

February 25, 1980

Appendix B - BIA Opinion

CHARGE:

Order: Sec. 241(a)(2), I&N Act
[8 U.S.C. 1251(a)(2)] --
Entered without inspection

APPLICATION: Withholding of deportation

This matter is before the Board on appeal from the immigration judge's decision of April 11, 1979, finding the respondent deportable as charged, denying his application for withholding of deportation under section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), but granting him the privilege of voluntary departure in lieu of deportation. The appeal will be dismissed.

The respondent is a 28-year-old native and citizen of Mexico. The record

reflects that on September 20, 1977, the respondent was convicted under section 275 of the Act, 8 U.S.C. 1325, for having "obtain[ed] entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact," to wit, he "falsely claimed to be a citizen of the United States and presented documentation in the name of another person in order to substantiate that false claim" (see Exhibit 3). The respondent was sentenced to serve 2 months and 28 days in prison and was placed on probation for 5 years. He took no appeal.

Entry without inspection is a term describing either an entry made by false and misleading statements as to United States citizenship, or entry made

surreptitiously. Matter of Y--, 8 I&N Dec. 143, 148 (BIA 1959); Matter of C--V--, 1 I&N Dec. 385 (BIA 1943). Moreover, the definition of entry contained in section 101(a)(13) of the Act, 8 U.S.C. 1101(a)(13), is applicable to both the criminal provisions of section 275 of the Act and the deportation provisions of section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2). Matter of Barragan-Garibay, 15 I&N Dec. 77 (BIA 1974). Accordingly, the respondent's conviction under section 275 stands as clear, convincing, and unequivocal evidence of his entry without inspection, and he is collaterally estopped from relitigating that issue in these proceedings. Id.; Matter of Rina,

15 I&N Dec. 346 (BIA 1975). Thus, the respondent is properly deportable for entry without inspection under section 241(a)(2) of the Act.

The more substantial issue presented is the respondent's eligibility for withholding of deportation under section 243(h) of the Act, which provides that, "The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such courtry on account of race, religion, nationality, membership in a particular social group, or political opinion." The burden of proof to establish a persecution claim under section 243(h) rests with the alien. 8 C.F.R. 242.17(c); Matter of Dunar, 14

I&N Dec. 310 (BIA 1973); Henry v. INS, 552 F.2d 130 (5th Cir. 1977). That burden is met only where the alien demonstrates a clear probability that he will be subjected to persecution. Kashani v. INS, 547 F.2d 376 (7th Cir. 1977); Cheng Kai Fu v. INS, 386 F.2d 750 (2d Cir. 1967), cert. denied, 390 U.S. 1003 (1968). Moreover, the fact that an alien will not enjoy the same type and extent of political freedom in his homeland that he would enjoy in the United States does not establish a cognizable persecution claim under section 243(h). See Matter of Liadakis, 10 I&N Dec. 252 (BIA 1963); Matter of Surzycki, 13 I&N Dec. 261 (BIA 1969).

Appendix B - BIA Opinion

The respondent testified that he is and has been a political leftist, an adherent of Marxist doctrines. His political activism in Mexico began in the Autumn of 1968 when he participated in a demonstration protesting an alleged violent repression by Government troops of a mass peaceful demonstration in Mexico City. From 1969 to 1972, as an economics major at the University of Monterrey in the State of Nuevo Leon, the respondent participated in several student protests and demonstrations. In early 1973, the respondent joined an organization of student political activists called the Student Revolutionary Committee (CER) which evolved from several "discussion groups" comprised of students endeavoring to

"define political perspectives." Later that year the respondent severed his relationship with the CER when it became increasingly militant and began to engage in terrorist/guerrilla activities.

These factual allegations provide the background for subsequent events leading to the respondent's current persecution claim. The respondent testified that on January 17, 1974, a friend who was a librarian in the University Department of Economics was assassinated. Two days later, the local newspaper published an article containing the names and pictures of several alleged leaders (including the respondent) of the CER, which was identified as a terrorist

organization. 1/ The respondent stated he did not have full knowledge of the associations or criminal activities of these other alleged CER members, but he maintained that he had not been involved in any criminal activities himself, and so became quite alarmed at the false information about him. Although the record does not establish

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1/ The article refers to the CER by another name, the FER, or Student Revolutionary Front. We note that the respondent testified that this article also implicated him in the assassination conspiracy against his librarian friend. Although the respondent did not submit the required English translation of the article, our review of it reflects that the article merely identified the respondent as an apparent CER leader but did not accuse him of playing any role in the librarian's death. This is but one of several examples where the respondent has advanced an allegation of persecution which is not properly suggested or supported by the actual incidents of record.

that the police were actually searching for him at this time, the respondent determined that he could not safely approach the authorities to clear his name or obtain a fair "trial," and he consequently fled to Baja California, Mexico. He stated he returned to northeastern Mexico in early April 1974, married his wife on April 7, and came to the United States two days later in order to obtain sanctuary from the Mexican authorities.

The respondent's claim to having a well-founded fear of persecution in Mexico is based upon several factors. First, he presented evidence 2/ to show

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2/ This evidence included the testimony of a Washington, D.C. area law professor qualified as an expert on human rights conditions in Latin American countries (having participated in several on-site

generally that some political repression and persecution allegedly does occur in Mexico which involves the unlawful arrest, disapperance, detention without trial, torture, and killing of persons engaged in criminal activity or in the advocacy of unorthodox political beliefs. However, even if such instances do exist, this evidence is useful only as general background; it does not establish the likelihood of this particular alien being subjected to persecution in Mexico. See Fleurinor v. INS, 585 F.2d 129, 133 (5th Cir.

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inspections and interviews with a discrete number of alleged Mexican political prisoners), and the testimony of a woman, the mother of an apparent Mexican political prisoner, who is a leader of an organization in Mexico which seeks to compel an official accounting and the ultimate release of Mexican political prisoners.

1978); Matter of Williams, 16 I&N Dec. 697 (BIA 1979).

Second, the respondent presented evidence claiming that some of his fellow university students and members of the CER have been imprisoned, tortured or killed. Of these, the respondent's evidence actually suggests that at most, only a handful allegedly may have been the object of purely political persecution. Several others admittedly were engaged in terrorist activities and were arrested or killed as a result of those activities. As for the remainder, the respondent generally had either incomplete or no knowledge of the full scope of their activities and could only speculate as to the reasons for their difficulties; thus, the respondent did not demonstrate that these

people had been targets of political persecution as opposed to criminal prosecution or arrest. In conclusion, while this evidence, taken as a whole, may have some bearing upon the respondent's claim, it is not sufficiently persuasive to establish that as an individual he would be subject to political persecution upon return to Mexico.

Finally, the respondent presented evidence which he contends shows he has been accused of many fabricated or "trumped-up" criminal charges by Mexican police in Nuevo Leon, and thus proves that he is the object of a deliberate scheme to persecute him for his political beliefs. This evidence consists largely of a few newspaper articles which do mention the respondent specifically by

name or contain his photograph. Of these, some merely identify him as an alleged leader of the CER or of another "terrorist" organization; they do not charge the respondent with any specific crimes, and, so far as we are aware, mere membership in an organization--absent personal commission of criminal acts--is not a crime in Mexico. The two or three remaining articles do allege that the respondent engaged in criminal activity, identifying him as a thief, a participant in the robbery of a bread factory on approximately August 30, 1974, and as a gunman in a shoot-out with police on April 23, 1974. With the exception of this last charge, these articles suggest only that the police had contemporary interest in the respondent at that time,

apparently as a result of his known close identification with the student activist and political dissident movement, and his association--whether past or then-existing--with persons who were actually terrorists. After the late Summer of 1974, the respondent's name does not appear in newspapers or elsewhere in connection with terrorism charges, and it thus seems that the authorities' interest in the respondent for those charges was but a passing one. This conclusion is further bolstered by the fact that, according to an October 1977 letter from a Mexican police official to the Service and a related "wanted" poster, the respondent is officially wanted only for the charge of engaging in the shoot-out with police

on April 23, 1974. Therefore, this is the only apparent outstanding charge to which the respondent even can arguably point as representing a "scheme" of trumped-up charges due to persecution for his political beliefs.

The respondent contends that this shoot-out charge represents a persecution scheme because he was allegedly living in the United States on April 23, 1974, and thus the charge must be false. However, we do not consider this possibility that the respondent is wanted for the shoot-out charge 3/ as being tantamount to establishing that he would be persecuted in Mexico. First, the respondent has not shown that this charge

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3/ The record does not contain evidence of the existence of any formal

is in fact fabricated. He claims that the charge is false because he entered the United States on April 9, 1974, and was working a full-time job on the day when the shoot-out occurred. However, the current record does not satisfactorily support this claim.

The respondent testified (Tr. p. 189) that he could not remember the name of the false identity with which he entered and, when asked how much he paid for it, he replied "Well, I think, I believe, I told you something like two hundred pesos, I believe." The hesitancy and uncertainty of that answer speaks for

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indictment of the respondent for this alleged crime, nor that today Mexican authorities otherwise still seek to take any action against him for this event which occurred some eight years ago.

itself, and stands in stark contrast to the assuredness of the respondent's testimony in virtually all other areas. Furthermore, in his pamphlet entitled My Story (Exhibit 8), the respondent states he entered the United States on April 9 at Eagle Pass, Texas, and traveled to Houston, yet, at the hearing he testified (Tr. p. 117) that he entered at Brownsville, Texas (a few hundred miles from Eagle Pass), and went to Houston. 4/ In My Story, the respondent also says that after arriving in Houston, he began working at a restaurant earning less than

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4/ The respondent has testified that his alleged April 9th entry followed his wedding date by two days. However, on at least one occasion he inconsistently testified (Tr. p.23) that, "I was married the 9th of December of 1974 in Morelos, Coahuila, Mexico. I was married by the civil regist[rar] and by the [C]hurch."

$2.00 an hour, and at the hearing he testified (consistent with My Story) that he began working eight hours per day, seven days a week as an assistant to the bartender at a place called the Barbary Coast earning $1.80 an hour. He then submitted copies of pay stubs in the name of his alleged first alias, Roberto Zamora, in order to further document this claim (see Exhibit 16). However, the employer is inexplicably shown as Harold Farb Construction Company, and the rate of pay is shown as $2.00 an hour and later $2.25 an hour, not $1.80 an hour. In view of the several inconsistencies noted above, it must be concluded that the respondent has failed to establish that he was present in the United States on April 23, 1974, and thus, that the

shoot-out charges against him are necessarily false. 5/

Second, even if these shoot-out charges are false, the respondent's persecution claim has not been established. There is no compelling reason to believe that the respondent would not receive a fair trial in Mexico and, if the evidence of his innocence is as convincing as he asserts, be exonerated of the charge. The judicial system of Mexico is generally regarded as among the most advanced and enlightened

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5/ We note that section 243(h)(2)(C) stipulates that the withholding of deportation provision shall not apply if it is determined that "there are serious reasons for considering that the alien has committed a serious nonpolitical crime outside the United States prior to the arrival of the alien in the United States."

of all countries in Central and South America. While isolated aberrations to the fair trial norm may occur, the respondent's expert witness law professor also testified to his belief that even in parts of the United States, people are sometimes subjected to persecution and civil rights abuses. Even if so, this of itself would be insufficient reason to presume in advance that a specific instance of persecution would occur here. Similarly, we are unwilling to conclude, and the record does not sufficiently show, that this individual respondent would be persecuted in Mexico and be unable to obtain a fair trial on the police shoot-out charge against him.

In addition, the evidence of record at least suggests that conditions have

improved under the current Mexican president's administration and that the Government is making efforts to correct whatever relatively small number of discrete civil rights infringements may have taken place in the past. We observe that the respondent's expert female witness testified (Tr. pp. 374-380) to the fact that three or four other CER members, who were falsely imprisoned, have been freed, and that as of April 1979, there were no longer any CER members still in custody. Moreover, she noted (Tr. pp. 358-359) a case similar to the respondent's alleged situation, where a man was imprisoned on false kidnapping charges even though he could prove he was elsewhere at the time the crime occurred; nevertheless, he also was later freed

under the Mexican amnesty laws. 6/ All this is a further indication that conditions in Mexico have improved and that the respondent's fear of inability to obtain a fair trial is unfounded.

6/ With regard to these amnesty laws, it is quite possible that the respondent is eligible to receive amnesty for the shoot-out with police (real or not) on April 23, 1974. Article 3 of the Amnesty Law of September 28, 1978 (see Exhibits 53 and 78), provides as follows:

> In those cases involving attempts against another person's life, bodily harm, terrorism and kidnapping, the benefits of amnesty can be extended to those who, according to the opinion of the Attorney General of the Republic and the Attorney General for the Federal District, in accordance with the reports provided by the General Bureau of Coordinated Services for Prevention and Social Rehabilitation of the Ministry of the Interior, have taken party in committing these actions but who do not reveal a high degree of danger.

The respondent has contended that this Amnesty Law applies only to political crimes, not ones involving violence or

Other evidence which shows that the respondent does not have a well-founded

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bodily harm, and therefore he concludes he could receive no benefit therefrom. However, the plain terms of Article 3 above clearly make provision for amnesty from just such crimes. The respondent and his wife testified that they also believe the Amnesty Law is useless because it applies only to federal crimes, not state crimes such as that with which the respondent is charged. The opinions of the respondent and his wife are not legally expert, and the record otherwise contains no adequate support for this claim. Counsel's appellate brief intimates that her expert witness (the law professor) supported the respondent's belief on this point. A review of that expert's testimony reveals that he advanced no such opinion. Even is he had, that witness had not been qualified as an expert to testify concerning Mexican constitutional law and the intricacies of its federal system, supremacy doctrines, etc. Therefore, the record is at least unsettled regarding the respondent's eligibility for, and the efficacy of, the Amnesty Law as it concerns the shoot-out charge against him. In any even, we place no reliance upon this possibility of amnesty in deciding the merits of the respondent's persecution claim herein.

fear of persecution is the fact that his family has suffered no persecution in Mexico and that he has voluntarily returned to Mexico several times since 1974. The record reflects that the respondent's wife, child, mother, and nine siblings reside in Mexico, yet none of them has been persecuted or harassed in any way by Mexican authorities. Whether family persecution has occurred is at least a somewhat relevant factor in the consideration of an alien's own persecution claim, and, depending upon the particular circumstances, it may have even greater probative value as an indicium of the likelihood of his persecution. Here, the female expert witness's testimony and the written statements of several apparent prisoners

in Mexico speak of numerous, even routine, instances where the immediate families of accused political dissidents or terrorists are subjected to police harassment, surveillance, ransacking of their homes, and even arrest, beatings, and torture. Therefore, the fact that none of the instant respondent's family has been subjected to such abuse is a significant factor which tends to belie his persecution claim. As for his voluntary journeys into Mexico, the respondent explains that he did so in order to meet with an attorney so that he might devise a means of effecting his permanent return to Mexico. However, the record contains no explanation, adequate or otherwise, as to why these dealings could not have been

conducted with the respondent remaining in the United States rather than exposing himself to the allegedly great risk of detection by Mexican authorities. Moreover, on at least one or two occasions the respondent traveled to Mexico not to see the attorney but merely to visit his wife and child. The fact that the respondent would voluntarily enter Mexico for these reasons and with no attempt to disguise himself other than with a neat appearance, a business suit, and false United States citizen identity, is not consistent with his purported fear for his life were he to be apprehended there.

Finally, it is significant that the respondent's own expert witness, the law school professor and civil rights

authority, a man who was quite familiar with the respondent's case and persecution claim, was unable "to state conclusively one way or the other" (Tr. pp. 314-315) whether or not the respondent mignt have a well-founded fear of persecution upon return to Mexico. When a person who is either impartial to or sympathetic with the respondent's position nevertheless expresses his expert opinion to such effect, it thereby becomes even more apparent that the respondent has failed to demonstrate a clear probability that he will be singled out as an individual and subjected to persecution. 7/

7/ In view of some of the events which transpired in the course of the proceedings below, we wish to emphasize that simply because an alien may adhere

In conclusion, upon consideration of all the foregoing--including the various claims advanced by the respondent, both individually and collectively--we find that the respondent has failed to establish a well-founded fear of persecution such that his "life or freedom would be threatened [in Mex-

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to Marxist or other unorthodox political philosophies, he is not thereby foreclosed from seeking to establish eligibility for withholding of deportation. We are disturbed that the General Attorney's questioning of the respondent and other witnesses at the hearing improperly focused upon the respondent's particular political ideology, rather than upon the sole issue of whether the respondent has a well-founded fear of persecution as a result of those beliefs. By the same token, it is also unfortunate that in her closing statement, the respondent's counsel--apparently caught up in the heightened emotion of the moment--clearly exceeded the bounds of proper judicial

ico] on account of . . . political opinion." Therefore, he is ineligible for withholding of deportation under

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courtesy and decorum by the use of loaded adjectives and disparaging remarks which constitute nothing more than an ad hominem attack upon the General Attorney. (Counsel used such phrases (see Tr. pp. 471-476) as "frightening ignorance," "crude misstatement," "shameful attempt to red bait" a witness, and conducting a "bizarre inquisition," in reference to the General Attorney, and even included some depreciative offhand remark concerning the General Attorney's car pool.) Such conduct is inconsistent with the dignity and restraint befitting a formal deportation proceeding before an immigration judge. It would have been sufficient for counsel to merely point out why she considered the substance of the General Attorney's questioning to be unfounded, improper, or irrelevant to the issue presented and let the record speak for itself, without resort to attempts at bringing the General Attorney into personal disrepute, and obscuring the real issues in this case with emotional rhetoric.

section 243(h) of the Act, and, accordingly, the appeal will be dismissed. 8/

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time

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8/ This finding that the respondent has failed to establish a well-founded fear of persecution in Mexico also renders him ineligible for asylum under section 208 of the Act, 8 U.S.C. 1158. See also section 101(a)(42) of the Act, 8 U.S.C. 1101(a)(42); Matter of Lam, Interim Decision 2857 (BIA 1981).

as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

Appendix C

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

FILE: A19 870 798 - Houston, Texas

IN THE MATTER OF	)	
	)	
HECTOR MARROQUIN-	)	IN DEPORTATION
	)	PROCEEDINGS
MANRIQUEZ	)	
	)	
RESPONDENT	)	

CHARGE: I&N Act 1952 - Section 241(a) [8 USC 125(a)(2), entry without inspection as an alien.

APPLICATIONS:

(1) Letters rogatory of 2 citizens and residents of Mexico; Carlos Solano Macias, and Hector Villagras Caletti

(2) Temporary withholding of deportation under section 243(h) of the Act [8 USC 1253(h)].

(3) Claim for benefits of Articles 32 and 33 of the United Nations Convention of 1951 effective when United States adhered to the 1967 Protocol, TIAS 6577, 19 U.S. Treaties (Part 5, 1968) 6223.

(4) Subpoena for author of Office of Refugee and Migration Affairs letter of June 6, 1978 - James L. Carlin.

(5) Subpoena duces tecum of the Legal Attache American Embassy, Mexico City during 1974, for such documents including all the FBI's intelligence activities, particularly in Nuevo Leon, Mexico from 1968 through 1974, in particular the FBI's knowledge of and participation in the persecution of political opponents of

the Mexican government, including all documents referring to Hector Marroquin, Carlos Solan [sic], Hector Villagara [sic], the Comite Estudiantil Revolucionario (CER), and Jesus Piedra Ibarra.

(6) Voluntary departure under section 244(e) of the Act.

IN BEHALF OF SERVICE:
Daniel Kahn, Esquire
Trial Attorney (INS)
Houston, Texas

IN BEHALF OF RESPONDENT:
Margaret Winter
Attorney at Law
14 Charles Lane
New York, N.Y. 10014

DECISION OF THE IMMIGRATION JUDGE

DEPORTABILITY:

The respondent is a 25-year-old married, male, native and citizen of Mexico who last entered the United States on a knowing false claim to United States cit-

izenship on September 18, 1977. At the deportation hearing, begun April 3, 1979, respondent admitted the first three allegations of fact, including that he is a native and citizen of Mexico and last entered the United States, September 18, 1977 at Eagle Pass, Texas. He denied the fourth and fifth allegations, that is: that he entered the United States on his false claim to United States citizenship, thus he was not admitted as an alien. Under section 291 of the Act, [8 USC 1361], alienage and identity established, it is the respondent's burden to establish the time, place and manner of entry into the United States. Group Exhibit No.2 includes respondent's affidavit of September 18, 1977 in which he admitted that he attempted to enter the United States

at Eagle Pass, Texas on a false claim to United States citizenship with documents to falsely indicate he was Jose Angel Macias, born in the United States. Respondent also admitted the certified copy of the conviction record U.S. v. Hector Andres Marroquin-Manriquez a/k/a/ Jose Angel Macias-Sanchez, Magistrate Docket No. VII, case No. 77-0438M-01, relates to him.

On September 20, 1977 respondent plead guilty to a violation of 8 USC 1325, and was sentenced to serve 2 months 28 days and was placed on probation for a period of 5 years. (Group Exhibit No. 3).

I find therefore the 4th and 5th allegations of fact have been established, and deportability as charged in the Order

to Show Cause (Exhibit No. 1), has been established.

CONSIDERATION OF OTHER POSSIBLE RELIEF FROM DEPORTATION

Respondent testified that he has a United States citizen child born in Chicago, Illnois, January 27, 1975 with the birth certificate name of Andres Rodolfo Macias. Respondent does not come within the protective umbrella of Silva v. Levi (Bell) - 76 C 4268, (Northern Dist. of Ill., March 10, 1977). No request was ever made to an American Consular officer abroad for a priority date letter, and respondent's last entry was after March 11, 1977.

Respondent could not adjust his status here under section 245 of the Act. His entry without inspection precludes ad-

justment. He has neither an immediate relative within section 201(b) of the Act nor a family tie to bring him within section 203(a)(1), (2), (4) or (5), and he has no labor certification from the Department of Labor.

Respondent is not eligible for suspension of deportation under section 244 of the Act. He has not served in the Armed Forces of the United States. His first entry into the United States was approximately April 9, 1974, which would not give him the seven years residence to qualify for suspension under section 244(a)(1) (nor for relief under section 249 of the Act).

There has been no evidence that respondent is statutorily barred from volun-

tary departure from the United States, in lieu of deportation.

CLAIM OF PERSECUTION:

Respondent filed an application for temporary withholding of deportation under section 243(h) of the Act, (Group Exhibit No. 4), and for relief from deportation under Articles 32 and 33 of the United Nations Convention of 1951.

MOTION FOR LETTERS ROGATORY OF CARLOS SOLANO MACIAS AND HECTOR VILLAGRA CALLETI:

Respondent alleges that the testimony of these Mexican officials, or former officials, would establish that they have delibertely exposed respondent to torture and assassination, and they have directed the torture of political prisoners - which goes to the question of respondent's claim of persecution as being

well founded. It is alleged that respondent was falsely charged by these two Mexican officials of complicity in criminal acts: murder of a librarian in Monterrey, Nuevo Leon, Mexico, (well before respondent first left Mexico on or about April 1974); and other crimes including assault and robbery in Monterrey after respondent allegedly entered the United States in April 1974.

See Immigration Law and Procedure, Gordon and Rosenfield section 5.9(g). The one seeking letters rogatory in a foreign country has the burden of showing their necessity and feasibility. See Matter of Vardjan, 10 I & N Dec. 567, (BIA, 1964). In that case a national of Yugoslavia wanted to get admissions against interest by a Yugoslav official.

The BIA in Vardjan affirmed the denial of such a request, noting that if the official were willing to make any statement at all, the probability of obtaining probative evidence favorable to the respondent was remote. Respondent's request for letters rogatory was denied (Group Exhibit No. 4). My suggestion for the expeditious submission of appropriate interrogatories (and cross-interrogatories) was declined at the hearing.

RESPONDENT'S REQUEST FOR A SUBPOENA OF THE AUTHOR OF OFFICE OF REFUGEE AND MIGRATION AFFAIRS DENIAL LETTER:

It is felt that the existence of the asylum claim (as of October 14, 1977), the Service request for consideration by the Office of Refugee and Migration Affairs, the Department of State's response, and the district director's de-

nial of asylum under 8 CFR 108 should be a matter of record and is so included in the record of proceedings in Group Exhibit No. 5. An immigration judge cannot grant asylum requests, (under 8 CFR 108). See Matter of Exantus and Pierre, I. D. No. 2622 (BIA, 1977) and Matter of Chumpitaz, I. D. No. 2679 (BIA, 1978).

However, an immigration judge is not bound to give any consideration to a letter from the Department of State, Office of Refugee and Migration Affairs. Pereira v. INS, No. 75-3569 (9th Cir., April 4, 1977). In my determination of relief from deportation in this case I give no consideration to the Department of State letter of June 6, 1978. My decision is not based in any

manner on such a letter. I therefore see no reason for such a subpoena and I decline to issue such subpoena.

RESPONDENT'S REQUEST FOR A SUBPOENA DUCES TECUM OF THE LEGAL ATTACHE, AMERICAN EMBASSY, MEXICO CITY DURING 1974.

Respondent maintains that the FBI agent in charge in Mexico City has knowledge of and has illegally participated in the persecution of political opponents of the Mexican government.

According to the testimony of Roger Rudenstein, of the political rights defense fund of the Socialist Workers' Party, he has over a period of years examined some 50,000 FBI documents obtained under the Freedom of Information Act. Group Exhibit No. 87 purport to show that the FBI is interested in communist groups and individuals in Mexico.

Admittedly none of the 26 pages in Exhibit 87 relates to Respondent Marroquin.

It appears that the FBI does have an interest in communist groups and individual communists.

However, the deportation charge in the case of Marroquin is based upon his entry without inspection, under section 241(a)(2). Deportation is not sought under any other provision of section 241(a).

If Respondent Marroquin's political activity has any relevance in these proceedings it is in the area of his claim to political persecution if returned to Mexico. At the most, in that area, the FBI reports could establish that Respondent Marroquin was politically active in

Mexico. I find from the evidence of record that Mr. Marroquin was, at least, politically ative in Mexico.

I do not foresee the Department of Justice making public any classified documents because requested by an immigration judge. Nor do I see how, under the facts of this case, that the testimony of the FBI agent in charge in Mexico City is 'essential' to a determination of this particular respondent's request for such subpoena.

CLAIM FOR RELIEF UNDER SECTION 243(h) OF THE ACT AND UNDER ARTICLES 32 AND 33 OF THE UNITED NATIONS CONVENTION OF 1951:

See 8 CFR 108.2, regarding Asylum claims under section 203(a)(7) of the Act. It is there provided, in effect, that if the District Director believes an asylum claim is clearly lacking in sub-

stance, the Department of State is still given an opportunity to supply a statement containing matter favorable to the application, and departure of the alien is not enforced until 30 days following the date of notification unless a reply has been received from the Department of State prior to that time.

There is provision in 8 CFR 108.2 that a denial of an application under section 203(a)(7) of the Act does not preclude the filing of an application for the benefits of section 243(h) at a subsequent expulsion hearing.

There is no requirement in 8 CFR 243, where a claim is made under section 243(h) of the Act, that the State Department be consulted. However a letter was sent by the District Director to the

Department of State. That letter, and the District Director's denial of the asylum claim are in evidence (Group Exhibit No. 5). However, again, my decision is not based in any manner on the Department of State letter.

The fact that an alien will not enjoy in his homeland the same type, degree and extent of political freedom that he would enjoy here does not bring him within the purview of section 243(h) of the Act. See Matter of Leadakis, 10 I & N Dec. 252 (BIA, 1963) and Matter of Surzycki, 13 I & N Dec. 261 (BIA, 196 [illegible].

The burden of proof in establishing that he would be subject to persecution as claimed under section 243(h) of the Act rests with the alien, 8 CFR

242.17(c). See Hosseinmardi v. INS 405 F. 2d 25 (9th Cir., 1968). The courts have restricted section 243(h) benefits to cases where there is a clear probability of persecution of a particular individual, Lena v. INS, 379 F. 2d 536 (7th Cir., 1967), and to establish such a probability the alien must show that he will be singled out as an individual and suffer persecution, Chang Kai Fu v. INS, 386 F. 2d 750 (2nd Cir., 1967), Cert. den. 390 U.S. 1003 (1968).

QUESTION PRESENTED - IS WHETHER OR NOT RESPONDENT'S POLITICAL ACTIVITY IS OF SUCH A DEGREE THAT IF HE WAS RETURNED TO MEXICO HE WOULD BE PERSECUTED:

So far as I am aware there are no precedent decisions relating to political persecution claims in Mexico, in a depor-

tation proceeding. Section 243(h) of the Act provides:

> The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

Article 32 of the convention seems in paragraph 1 to limit its application only to aliens lawfully in the territory of a contracting state. Respondent is not lawfully in the United States and thus is not within the purview of Article 32, see Matter of Dunar 14 I & N Dec 310, (BIA, 1973).

Article 1 of the United Nations 1951 Convention relating to the status of refugees defined a refugee as a person who .

. . owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . . (emphasis applied).

Article 33 of the Convention provides:

> (1) No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

A thorough review of the background information given the United States Senate regarding this country's accession to the protocol is found in Dunar, supra.

Appendix C - IJ Decision

See United Nations Economic and Social Council, early Report of the Ad Hoc Committee on statelessness and related problems, February 17, 1950, at 39 (E/1618; E/ AC. 32/5 which stated:

> The expression "well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political opinion" means that a person has either been actually a victim of persecution or can show good reason why he fears persecution.

Respondent never registered to vote in Mexico. He has never been arrested nor jailed nor in any way persecuted in Mexico. Respondent has a mother, wife, child and 6 sisters and 2 brothers in Mexico. None of them has ever been arrested or jailed in Mexico.

Respondent claims that many Mexican citizens who are (only) political activ-

ist are arrested on "trumped-up" criminal charges, are tortured and forced to sign untrue confessions. That some of these people are placed in custody for years without ever going to trial.

Professor Robert K. Goldman, Acting Dean of the American University Law School, Washington, D. C. , testified at length on April 4, 1979 in this proceeding. The Report of the Commission of Inquiry to Mexico co-authored by Professor Goldman and Daniel Jacoby is in evidence as Group Exhibit No. 56.

Professor Goldman testified that the information in the report, as it relates to the 120 prison inmates, relates to a discreet class. These 120 prisoners were not picked at random from the prison population. These prisoners were sought out

for depositions because they avered they were purely political prisoners. Of this select group of 120 about 12 freely admitted that they had committed "real" crimes and were not in custody for purely political activity. That the number of such prisioners [sic] is limited does not in any way negate the conclusions of the Report that there have been arbitrary arrests and detentions, torture, failure to get a speedy trial, et cetera.

However, the question remains will this particular individual, Hector Marroquin, now be subject to persecution in Mexico on account of his political opinions. After the period of these interviews, (Exhibit No. 56) from April 23, 1978 to May 4, 1978 the Mexican Congress under the present President Jose Lopez

Portillo, has in fact enacted an Amnesty Law, (Group Exhibit No. 53, and Group Exhibit No. 78). It is also noted that respondent has had considerable exposure on his 60 plus city speaking tour in this country. Respondent's political speaking tours and activities here have endeared him to numerous persons and organizations who undoubtedly would remind the Mexican authorities that such a celebrity should not disappear.

Mrs. Rosario Ibarra de Piedra, though not as scholarly as Professor Goldman was an equally impressive witness. Her son was allegedly abducted by Mexican authorities in 1973, though her son has never been brought to trial, she believes he is a prisoner in Military Camp No. 1. Mrs. Piedra and other women in Mexico

have formed a committee to defend political prisoners.

Again, the question is not the existence of political prisoners in Mexico, but the likelihood that respondent Marroquin would become one if he now returned to Mexico. It is noted that respondent's alleged fear of persecution was based in large measure on his former membership in the Comite Estudiantil Revolucionario (CER). It is noted that four members of the CER, according to the testimony of Mrs. Ibarra, have now been released from detention.

Mr. Marroquin in his book My Story, (Group Exhibit No. 8), at page 15 relates that in 1974 when he left Monterrey, N. L., Mexico and went to La Paz, Baja California, he took some

precautions. He dyed his hair, touched up his moustache with mascara, dressed in clothing different from that popular with students. However, over three years later when he traveled by car into Mexico he made no attempt to disguise himself. Respondent has a rather fair complexion in fact, he has a freckled face, [he has been referred to as "El Pecas" (Freckles)]. He testified at the hearing that he was both notorious and on Wanted Posters at that time. I find it incredible that a "notorious" Mexican subject so distinctive as to be nicknamed "El Pecas" could pass through the highway check point some 25 miles inside Mexico, in midafternoon if the Mexican authorities were really as concerned about his activities as he now claims.

It is also noted in his affidavit of September 18, 1977 that respondent indicated that he didn't know if he was still wanted in Mexico.

It appears that from 1974 to 1977 respondent was exactly like countless other undocumented Mexican aliens. He came here surreptitiously. He worked here without authorization for at least 4 different employers. Like other undocumented workers he made multiple illegal entries, and like some others he complained that because undocumented he got a lower wage here. Like some others he used at least 2 other false identities. From a reasonable interpretation of record, respondent had no reason to claim persecution until after his arrest in September, 1977.

Appendix C - IJ Decision

The courtship of respondent and the Socialist workers [sic] Party began in 1975 (Exhibit 8, P. 17). But the union of respondent and the S.W.P. didn't occur until after his conviction for entry into the United States without inspection in September, 1977. Apparently it has been a mutually beneficial union, the S.W.P. wanted a cause to promote and respondent did not want to be deported.

If respondent really feared persecution because of his political activities in Mexico he certainly could have asked for asylum 3 years sooner.

I find no fault with the conclusions of Professor Goldman and Mrs. Piedr

Marroquin will either become a political prisoner or disappear in Mexico.

The respondent may not be able to go on a speaking tour in Mexico decrying that government's shortcomings as he has about this government (he prefers Castro's Cuba to the United States). But the fact that an alien would not enjoy in his own country the same type, degree and extent of political freedom, and freedom of the press, as he would enjoy here, does not bring him within the purview fo [sic] section 243(h) of the Act. See Matter of Liadakis, 10 I & N Dec. 252, (BIA, 1963); and Matter of Surzychi, 13 I & N Dec. 261, (BIA, 1969).

The fact that respondent is not a disinterested party must be considered in evaluating his claim to persecution.

Credibility involves more than demeanor. It apprehends the overall evaluation of testimony in light of its rationale or internal consistency and the manner in which it hangs together with other evidence. Carbo v. INS, 314 F. 2d 718, 749 (9th Cir., 1963).

From a careful review of the entire record, and carefully observing respondent's demeanor, I find that the respondent has not established that if he were to return to Mexico that he would be subjected to persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. This is true whether the claim be made under the provisions of section 243(h) of the Act or whether it be put forward within the meaning of the

Protocol Relating to the Status of Refugees, and Articles 32 and 33 of the United Nations Convention of 1951 relating to the status of refugees.

ORDER: IT IS ORDERED that the respondent's application for temporary withholding of deportation to Mexico under section 243(h) of the Act and under Articles 32 and 33 of the United Nations Convention of 1951 relating to the Status of Refugees, be denied.

IT IS FURTHER ORDERED that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before thirty days from the date of this order, or any extension beyond such date as may be granted by the district director and

under such conditions as the district director shall direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall become immediately effective: respondent shall be deported from the United States to Mexico on the charge contained in the Order to Show Cause.

Dated: April 11, 1979

/s/ James R. Smith, Immigration Judge

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Appendix D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3163

HECTOR ANDRES MARROQUIN-MANRIQUEZ,
Petitioner

vs.

THE IMMIGRATION AND NATURALIZATION SERVICE,
Respondent

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, Circuit Judges

The petition for rehearing filed by petitioner in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available

circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ John J. Gibbons
Judge

Dated: February 28, 1983

Appendix E

STATUTES AND RULES INVOLVED

8 U.S.C. §1101(a)(42) states:

(42) The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a wellfounded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion, or (B) in such special circumstances as the President after appropriate consultation (as defined in section 1157(e) of this title) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

the term "refugee" does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion.

§208 of the INA, 8 U.S.C. §1158 states:

> §1158. Asylum procedure -- Establishment by Attorney General; coverage
>
> (a) The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.
>
> Termination of asylum by Attorney General; criteria
>
> (b) Asylum granted under subsection (a) of this section may be terminated if the Attorney General, pursuant to such regulations as the Attorney Gen-

> eral may prescribe, determines that the alien is no longer a refugee within the meaning of section 1101(a)(42)(A) of this title owing to a change in circumstances in the alien's country of nationality or, in the case of an alien having no nationality, in the country in which the alien last habitually resided.
>
> Status of spouse or child of alien granted asylum
>
> (c) A spouse or child (as defined in section 1101(b)(1)(A), (B), (C), (D), or (E) of this title) of an alien who is granted asylum under subsection (a) of this section may, if not otherwise eligible for asylum under such subsection, be granted the same status as the alien if accompanying, or following to join, such alien.

§242(b)(3) of the INA, 8 U.S.C. §1252(b)(3) states in relevant part that in deportation proceedings:

> the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government. . . .

Appendix E - Statutes and Rules

§243(h) of the INA, 8 U.S.C. §1253(h) states:

> The Attorney General shall not deport or return any alien to a country if the Attorney General determines that such alien's life would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 C.F.R. §287.4(a)(2) in relevant part states:

> a district director or a special inquiry officer having jurisdiction over the matter may, upon his own volition or upon application of a trial attorney, the alien or other party affected, issue subpoeans requiring the attendance of witnesses or for the production of books, papers and other documentary evidence, or both. A party applying for a subpoena shall be required, as a condition precedent to its issuance, to state in writing or at the proceeding what he expects to prove by such witnesses or documentary evidence, and to show affirmatively that he has made

diligent effort, without success to produce the same. Upon being satisfied that a witness will not appear and testify or produce documentary evidence and that his evidence is essential, the district director or special inquiry officer shall issue a subpoena.

Article 1 of the Protocol defines "refugee" in pertinent part as one who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Article 33 of the Convention states:

Prohibition of Expulsion or Return ("Refoulement")

1. No Contracting State shall expel or return ("refou-

ler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.